IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-560

JO ANN EVANS GARDNER,
Petitioner,

v.

WESTINGHOUSE BROADCASTING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

ROBERT E. WILLIAMS
DOUGLAS S. McDOWELL
McGUINESS & WILLIAMS
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

TABLE OF CONTENTS

AUTHORITIES CITED

AUTHORITIES CITED—Continued

AUTHORITIES CITED—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-560

JO ANN EVANS GARDNER,
Petitioner,

v.

WESTINGHOUSE BROADCASTING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

MOTION FOR LEAVE TO SUBMIT BRIEF AS *AMICUS CURIAE*

To the Honorable, the Chief Justice and the Associate Justices of the United States Supreme Court:

Pursuant to Rule 42(3) of the Rules of this Court, the Equal Employment Advisory Council (hereafter EEAC) moves this Court for leave to file the accompanying brief as *Amicus Curiae* in support of the respondent in this case, Westinghouse Broadcasting

Company. In support of this motion, EEAC shows as follows:

1. EEAC is a voluntary nonprofit association organized as a corporation under the laws of the District of Columbia to represent and promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures and requirements pertaining to nondiscriminatory employment practices. Its membership comprises a broad segment of the employer community in the United States, including both individual employers and trade and industry associations whose employer-members have a common interest in the foregoing purpose. Its governing body is a Board of Directors composed primarily of experts and specialists in the field of equal employment opportunity whose combined experience gives the Council a unique depth of understanding of the practical and legal considerations relevant to the proper interpretation and application of EEO policies and requirements.

2. Substantially all of EEAC's members, or their constituents, are employers subject to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) as well as other equal employment statutes and regulations. As such, they have a direct interest in the issue presented for the Court's consideration in the instant case—i.e., whether the denial of a class action certification in a Title VII action seeking monetary, injunctive and other relief is immediately appealable as of right under 28 U.S.C. § 1292(a)(1) as an order refusing an injunction.

3. Because of its interest in issues pertaining to equal employment, EEAC has sought and been granted permission by this Court to file briefs as *Amicus Curiae* in a number of other recent cases raising serious Title VII issues. *See e.g., Int'l Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 14 FEP Cases 1514 (1977); *East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395, 14 FEP Cases 1505 (1977); *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 14 FEP Cases 1510 (1977); *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63, 14 FEP Cases 1697 (1977).

4. EEAC and its members have broad knowledge concerning the type of Title VII and class action issues involved here. Because of this knowledge and its extensive experience as *amicus curiae* in other Title VII cases, EEAC is well situated to brief this Court on the practical as well as legal aspects of the issue presented here.

5. Counsel for Westinghouse Broadcasting Company have informed the movant that they have no objection to the granting of this motion. EEAC's brief *amicus curiae* agrees with Westinghouse that the decision of the court below should be affirmed.

WHEREFORE, it is respectfully moved that the EEAC be granted leave to file the accompanying brief *Amicus Curiae* in this case.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
Counsel for the *Amicus Curiae*
Equal Employment Advisory Council

MCGUINESS & WILLIAMS
1747 Pennsylvania Ave., N.W.
Suite 1250
Washington, D.C. 20006
(202) 296-0333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-560

JO ANN EVANS GARDNER,
Petitioner,

v.

WESTINGHOUSE BROADCASTING COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL

STATEMENT OF THE CASE

Petitioner Gardner initiated a class action under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.*) alleging that her rejection for employment with Westinghouse Broadcasting Company was predicated upon company-wide policies which discriminated on the basis of sex. She sought mone-

tary and permanent injunctive relief in behalf of herself and a broadly-defined class of female exployees and female applicants for employment. No injunctive relief *pendente lite* was requested. The district court refused to certify the proceeding as a class action on the basis that the requirements of Fed. R. Civ. P. 23(a) had not been met.

Without first seeking a certificate of appealability under 28 U.S.C. § 1292(b) (1970), petitioner filed an interlocutory appeal from the order of the district court. She claimed that in view of her request for injunctive relief the court's refusal to certify the class was tantamount to a refusal to issue an injunction and therefore appealable, as of right, under 28 U.S.C. § 1292(a)(1) (1970). On appeal, the Third Circuit concluded that § 1292(a)(1) was inapplicable since the district court ruling was merely a procedural order, review of which could await final judgment without generating serious and irremediable consequences. In addition, the court noted that the appropriate avenue for interlocutory review of class action determinations in the Third Circuit was through appellate court approval of a § 1292(b) certificate.

QUESTION PRESENTED

Is the denial of class certification in a Title VII action in which injunctive relief is being sought immediately appealable, as of right, under 28 U.S.C. § 1292(a)(1) (1970) as an order refusing an injunction?

SUMMARY OF ARGUMENT

The injunction exception to the final judgment rule established in 28 U.S.C. § 1292(a)(1) is a narrow one intended to permit litigants to challenge interlocutory orders of "serious, perhaps irreparable consequence." *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 181 (1955). Procedural orders affecting the scope of available injunctive relief which do not touch upon the merits of a plantiff's claim, but rather determine the manner in which the litigation shall proceed, do not generate irreparable consequences appealable under § 1292(a)(1). *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966). Even if Plaintiff on appeal were to obtain a reversal of the district court's denial of class certification, no injunction would issue at that time. Rather, the case would be returned to the district court for trial. Remedial issues, such as injunctive relief, would not be addressed until the trial on the merits was completed. Thus, the denial of a class action certification is merely a procedural determination that the trial shall proceed on an individual rather than on a class basis, and as such is a mere practice order not falling within the narrow § 1292(a)(1) exception to the final judgment rule.

Expanding the scope of § 1292(a)(1) would also invite numerous piecemeal appeals in class action cases. Since appeals under that provision are a matter of right, the federal courts would have absolutely no authority to screen out nonmeritorious claims. The discretionary control over interlocutory appeals which the federal courts were afforded through en-

actment of § 1292(b) would be effectively negated in class action cases by an avalanche of § 1292(a)(1) appeals.

ARGUMENT

I. 28 U.S.C. § 1292(a)(1) Was Never Intended To Encompass Practice Orders Such As Denials Of Class Action Certifications.

A. *28 U.S.C. § 1292(a)(1) Is Intended To Avoid Irreparable Harm.*

Section 22 of the Judiciary Act of 1789, 1 Stat. 73, 84 (1789), provided that appeals in civil actions could be taken to the circuit courts only from final decrees and judgments. In the Evarts Act of 1891, 26 Stat. 828 (1891), the sole exception to the final judgment rule was "where, upon a hearing in equity . . . an injunction shall be granted or continued by an interlocutory order or decree. . . ." Four years later this exception was broadened to include cases in which injunctions were refused or dissolved or in which applications to dissolve injunctions were refused. 28 Stat. 666-667 (1895). Additions to the class of appealable interlocutory orders were made from time to time until enactment of § 1292 in its present form.[1] From the very outset this Court in-

[1] 28 U.S.C. § 1292(a)(1) (1970) provides:

> (a) The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court.

terpreted the injunction exception to the final judgment rule as reflecting a Congressional desire to "permit litigants to effectually challenge interlocutory orders of serious, perhaps irreparable, consequence." *Baltimore Contractors, Inc.* v. *Bodinger, supra; see, Smith* v. *Vulcan Iron Works*, 165 U.S. 518, 525 (1897); *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 545 (1949).

B. *Mere Practice Orders Are Not Appealable Under 28 U.S.C. § 1292(a)(1).*

Practice orders—i.e., those which do not relate to the merits of the case but rather merely determine the manner in which the litigation shall proceed—generally do not have a final and irreparable effect on the rights of the parties. Accordingly, even when such orders arguably circumscribe the scope of injunctive relief sought they are not appealable under § 1292(a)(1).

In *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc., supra*, plaintiff sought a permanent injunction and damages for trademark infringement. When the district court denied plaintiff's motion for summary judgment, he contended that the denial amounted to a denial of an injunction and was therefore appealable under § 1292(a)(1). This Court ruled that the order could not be appealed because it:

> [d]oes not settle or even tentatively decide anything about the merits of the claim. It is strictly a pretrial order that decides only one thing—that the case should go to trial. Orders that in no way touch on the merits of the claim but only relate to pretrial procedures are not in our view "interlocutory" within the meaning of § 1292(a)(1). We see no other way to protect the integrity of the congressional policy against piecemeal appeals. [385 U.S. at 25].

Accord, Goldstein v. *Cox*, 396 U.S. 471, 475 (1970); *Morganstern Chemical Co.* v. *Schering Corporation*, 181 F.2d 160, 162-163 (3rd Cir. 1950). Similarly, in *Baltimore Contractors, Inc., supra*, this Court held that an order refusing to stay an action pending arbitration was not appealable under the predecessor to § 1292(a)(1) because the ruling constituted merely "a step in controlling the litigation before the trial court, not the refusal of an interlocutory injunction." 348 U.S. at 185. Finally, in *National Machinery Co.* v. *Waterbury Farrel Foundry & Machine Co.*, 290 F.2d 527 (2d Cir. 1961), the district court refused to permit the defendant to assert permissive counterclaims seeking injunctive relief. The court reasoned that such claims would unfairly prejudice the plaintiff in getting its case to trial. The Second Circuit declined to entertain defendant's appeal under § 1292(a)(1) concluding that whenever a refusal to broaden an action to include a claim for an injunction is based neither on the merits nor on an alleged lack of jurisdiction but rather "on the wisdom of consolidating certain claims for trial," it is "not the kind of refusal of an injunction which permits interlocutory review by the Court of Appeals under 28 U.S.C. § 1292(a)(1)." 290 F.2d at 528. *See also,*

Stewart-Warner Corporation v. *Westinghouse Electric Corporation*, 325 F.2d 822, 828-830 (2d Cir. 1963) (Friendly, J., dissenting), *cert. denied*, 376 U.S. 944 (1964). Accordingly, discretionary practice orders which are designed to avoid undue delay or confusion in the course of a particular trial do not generate the requisite adverse consequences for a § 1292(a)(1) interlocutory appeal.

C. *A Refusal To Issue A Class Action Certification Constitutes A Practice Order, Not A Denial Of An Injunction.*

Those courts which have concluded that refusals to certify a class may be appealed as denials of injunctive relief [2] have simply ignored the fact that class action determinations are strictly procedural in nature—they merely determine the parties to the action without expressing any judgment as to either the merits of the case or the appropriateness of injunctive relief. *Williams* v. *Mumford*, 511 F.2d 363, 370, 10 FEP Cases 487, 492 (D.C. Cir. 1975), *cert. denied*, 423 U.S. 828 (1975); *City of New York* v. *International Pipe and Ceramics Corporation*, 410 F.2d 295, 300 (2d Cir. 1969). A determination as to whether a trial shall proceed on an individual or on a class basis is discretionary with the trial court and is subject to alteration or amendment at any time prior to final judgment. Fed. R. Civ. P. 23(c)(1). If after a judgment on the merits the relief

---

[2] *Yaffe* v. *Powers*, 454 F.2d 1362 (1st Cir. 1972); *Brunson* v. *Board of Trustees*, 311 F.2d 107 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963); *Jones* v. *Diamond*, 519 F.2d 1090 (5th Cir. 1975); *Price* v. *Lucky Stores, Inc.*, 501 F.2d 1177, 8 FEP Cases 613 (9th Cir. 1974).

granted is deemed insufficient, the class action determination is fully reviewable.

Most importantly, however, class action determinations in no way touch upon the merits of either the individual plaintiff's claim or those of absent class members. The district court in the instant case has merely determined that the claim of Jo Ann Evans Gardner and those of the alleged class members are sufficiently different that consolidation of the claims for purposes of a single trial would not constitute a wise expenditure of judicial resources. This is strictly a procedural determination. Both the procedural nature of class action determinations and the absence of a nexus between refusals to certify and the merits of requests for injunctive relief is highlighted by the fact that were a § 1292(a)(1) appeal allowed and the district court's refusal to certify reversed, the remedy would not be the automatic granting of the permanent injunctive relief sought by Gardner but merely a remand with instructions that the case proceed as a class action. *E.g.*, *Brunson* v. *Board of Trustees*, *supra* at 109; *Price* v. *Lucky Stores Inc.*, *supra*, 501 F.2d at 1179-1180, 8 FEP Cases at 614. Accordingly, to authorize § 1292(a)(1) appeals from refusals to issue class action certifications would, in the words of Judge Friendly in *Stewart-Warner Corporation* v. *Westinghouse Electric Corp.*, *supra* at 829 (dissenting op.):

> [e]xpand a narrow exception to the final judgment rule, intended for cases of true hardship, to include mere practice orders simply because a pleading contains the talismanic word "injunction". . . .

II. Interlocutory Review Of Denials Of Class Action Certifications Should Be Available Only At The Discretion Of The Courts Under 28 U.S.C. § 1292(b).

There are policy as well as statutory reasons why 28 U.S.C. § 1292(a)(1) (1970) should not be extended to encompass denials of class action certifications whenever injunctive relief is sought. This Court has long recognized that numerous considerations must be balanced in determining questions of appealability, "[t]he most important of which are the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickinson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-153 (1964).

Providing individual plaintiffs who have been denied class action certifications with § 1292(a)(1) appeal privileges will tip the scales heavily in favor of piecemeal review. Since § 1292(a)(1) constitutes a statutory exception to the final judgment rule, aggrieved plaintiffs would be afforded a guaranteed avenue of appeal irrespective of the complexity of the issues involved or the relative merit of their claims. At the same time the courts would be deprived of any discretionary authority to filter out those appeals which do not warrant the expenditure of judicial resources. Merely by incorporating a prayer for injunctive relief into a class action complaint, plaintiffs would be assured of a basis for interlocutory appeal of even the most routine adverse class action determination.

The inconvenience and costs attendant upon such § 1292(a)(1) appeals cannot be justified on the basis

that their foreclosure would result in irreparable harm to aggrieved plaintiffs or absent members of the purported class.[3] As noted earlier, orders refusing to certify class actions are procedural rulings which do not touch upon the merits of either the individual plaintiff's claim or those of the purported class.[4] *Williams* v. *Mumford, supra*, 511 F.2d at 370, 10 FEP Cases at 492; *City of New York* v. *International Pipe and Ceramics Corp., supra* at 300. More importantly, however, 28 U.S.C. § 1292(b) (1970),[5]

[3] This is particularly true in the instant case in view of the absence at a request for injunctive relief *pendente lite*.

[4] Contrary to the implication in Petitioner's brief, denial of an immediate interlocutory appeal will not effectively place the court's order beyond appellate review. Should Gardner lose her individual claim, the district court's refusal to certify the class could be included with her other assignments of error on appeal. *United Air Lines* v. *McDonald*, 97 S. Ct. 2464, 2469, 14 FEP Cases 1711, 1714 (1977). On the other hand, if Gardner were to prevail on her individual claim, she could still appeal the adverse class determination for the reasons described by Chief Judge Seitz in his concurring opinion below. Moreover, should Gardner elect not to appeal the class action ruling, or should class members be reluctant to rely upon Gardner as their class representative in light of her individual recovery, any class member could intervene for purposes of appealing the district court's order. *Id.* at 97 S. Ct. 2471, 14 FEP Cases 1715. And as Chief Judge Seitz noted, Rule 23(d)(2), F.R. Civ. P., allows the district court to issue any protective order and notice necessary to safeguard the interests of alleged class members when class certification is denied to a particular plaintiff.

[5] 28 U.S.C. § 1292(b) (1970) provides: When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

provides a more realistic and judicially manageable avenue of appeal for those infrequent situations in which either the interests of the parties or the orderly administration of judicial time mandate interlocutory review of class action determinations.

Section 1292(b) creates a double discretionary procedure for establishing appellate jurisdiction over interlocutory orders. Trial judges may certify for appeal any order which in their judgment involves a controlling question of law as to which there is substantial ground for difference of opinion and immediate appeal of which may materially advance the ultimate termination of the litigation. Certified orders are then screened by the appellate courts which have the discretion to accept or reject the appeals. The drafters of Fed. R. Civ. P. 23 clearly anticipated the use of § 1292(b) to review class action determinations. *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 390 n. 131 (1967); *Report of the American Bar Association Special Committee on Federal Rules of Procedure*, 38 F.R.D. 95, 104-105 (1965). Several courts have entertained § 1292(b) certifi-

cates with respect to orders both granting and denying class action certifications.[6]

A primary advantage which § 1292(b) offers over § 1292(a)(1) is judicial manageability. Section 1292(b) is "a judge-sought, judge-made, judge-sponsored enactment." *Hadjipateras* v. *Pacifica*, 290 F.2d 697, 702 (5th Cir. 1961). It represents a response to the need for a mechanism which will, in appropriate cases, avoid the harshness of the final judgment rule without falling prey to the very vice which would accompany a liberalization of § 1292(a)(1)—namely, opening the door to frivolous, dilatory, or harrassing interlocutory appeals requiring undue consumption of appellate court time. *See* Note, *Interlocutory Appeals in the Federal Courts Under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 610 (1975). As stated in *Hadjipateras* v. *Pacifica*, *supra* at 703, § 1292(b) was intended:

> [T]o give the appellate machinery of § 1291 through § 1294 a considerable flexibility operating under the immediate, sole and broad control of judges so that within reasonable limits disadvantages of piecemeal and final judgment appeals might both be avoided.

The availability of § 1292(b) for cases in which novel or controversial questions are at issue alleviates

[6] *Katz* v. *Carte Blanche Corporation*, 496 F.2d 747, 752-756 (3d Cir. 1974), *cert. denied*, 419 U.S. 885 (1974); *Wilcox* v. *Commerce Bank of Kansas City*, 474 F.2d 336, 339 (10th Cir. 1973); *Zahn* v. *International Paper Co.*, 469 F.2d 1033, 1034 (2d Cir. 1972), *aff'd.*, 414 U.S. 291 (1973); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1123 (5th Cir. 1969); *cf. Anschul* v. *Sitmar Cruises, Inc.*, 544 F.2d 1364, 1368-1369 (7th Cir. 1976), *cert. denied*, 429 U.S. 907 (1976).

the need for the strained interpretation of § 1292(a)(1) urged by Petitioner in this case.[7] As stated by the Ninth Circuit in *Cord* v. *Smith*, 338 F.2d 516, 521 (9th Cir. 1964):

> [T]he principal purpose of section 1292(b) is to permit appeals, with the concurrence of the trial court and the court of appeals, from interlocutory orders not appealable under section 1292(a). But the *existence of this method of appeal also removes any incentive to enlarge by a liberal construction the class of orders appealable under section 1292(a)*. (Emphasis supplied)

Thus, although § 1292(b), mandamus, and Rule 54(b) may be available in appropriate cases to provide interlocutory review of refusals to certify class actions, the Third Circuit has properly concluded that § 1292(a)(1) does not authorize such appeals. This conclusion is sound not only from the standpoint of statutory interpretation, but from the standpoint of efficient judicial administration of class action litigation as well. It is a conclusion deserving of affirmance by this Court.

[7] Similarly, the more limited appeal rights available under a Fed. R. Civ. P. 54(b) certificate, *e.g.*, *Hayes* v. *Sealtest Foods Division of National Dairy Products Corporation*, 396 F.2d 448, 449 (3rd. Cir. 1968), or in a 28 U.S.C. § 1651(a) (1970) mandamus action, *e.g.*, *McDonnell Douglas Corp.* v. *United States District Court*, 20 F.R. Serv. 2d 11 (9th Cir. 1975), should also relieve the pressure for an expansive interpretation of § 1292(a)(1).

CONCLUSION

For the foregoing reasons, the Equal Employment Advisory Council respectfully submits that the judgment of the Third Circuit should be affirmed.

Respectfully submitted,

ROBERT E. WILLIAMS
DOUGLAS S. MCDOWELL
MCGUINESS & WILLIAMS
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

February, 1978